NORMAN A. WHITTAKER

IBLA 72-46 Decided October 6, 1972

Appeal from a decision of the Arizona state office, Bureau of Land Management, declaring appellant's placer mining claims null and void ab initio in whole or in part and rejecting in part appellant's mineral patent application, A-6174.

Affirmed.

Mining Claims: Withdrawn Land

> Mining claims located on lands withdrawn from entry under the mining laws are null and void ab initio, and the subsequent restoration of the lands cannot serve to validate the void mining claims.

Railroad Grant Lands

> When a railroad company reconveys to the United States land which it received by patent under the Act of July 27, 1866, (14 Stat. 292), and in such reconveyance reserves the minerals, the land is not open to location under the mining laws of the United States, and mining claims located thereon are null and void ab initio.

APPEARANCES: Harry J. Kim, Esq., of Barrett, Stearns & Collins, for appellant.

OPINION BY MR. GOSS

Appellant has appealed from an Arizona state office, Bureau of Land Management, decision dated July 8, 1971, declaring certain of his placer mining claims null and void ab initio in whole or in part and rejecting in part his mineral patent application, A-6174.

The state office found that the lands involved were not open to mineral entry on the dates of attempted entry because:

> (1) Part of the land was patented to the Santa Fe Pacific Railroad Company's predecessor in

interest, the Atlantic and Pacific Railroad Company, by Patent No. 879795, dated September 18, 1922, and when the surface was reconveyed to the United States on April 11, 1946, and October 12, 1952, the minerals were reserved by the railroad company.

(2) Part of the land was withdrawn by orders of June 4, 1930, and October 16, 1931, and such land is either presently withdrawn or the withdrawal was revoked subsequent to the location of the claims.

Appellant contends on appeal that:

(1) Patent No. 879795 excluded minerals, except coal and iron, and therefore, upon reconveyance of the land to the United States the railroad could not reserve that which it never had.

(2) The withdrawn lands were at all times open to location under the mining laws.

The Act of July 27, 1866, 14 Stat. 292, ch. 278, § 3, granted to the Atlantic and Pacific Railroad Company, its successors (Santa Fe Pacific Railroad Company) and assigns:

* * * every alternate section of public land, not mineral, designated by odd numbers, * * * on each side of said railroad line, * * *

* * * * * * *

Provided further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, * * *

* * * * * * *

And provided further, That the word "mineral" when it occurs in this act, shall not be held to include iron or coal: * * *

The lands involved were patented to the railroad in accordance with the 1866 grant, supra.

The Supreme Court, in construing the above quoted language of section 3, held that the characterization of the land as mineral or nonmineral was a determination to be made by the Land Department

at the time of issuance of the patent, and that issuance of such patent afforded, upon collateral attack, conclusive evidence of the nonmineral character of the land and of the regularity of the acts and proceedings leading to its issue. Burke v. Southern Pacific Railroad Company, 234 U.S. 669, 691 (1914). The grant to Atlantic and Pacific Railroad Company thus did not exclude the mineral interest from the patent for a particular section; under the statutory grant no sections containing minerals could be patented at all. If any mineral reservation were included in a patent in violation of the statutory grant, it would have no effect on minerals subsequently discovered. Any minerals discovered subsequently on patented land would not belong to the United States. United States v. Union Pacific Railroad Company, 230 F.2d 690, 695 (10th Cir. 1956) rev'd on other grounds, 353 U.S. 112 (1957).

When Patent No. 879795 was issued on September 17, 1922, title to both the surface and subsurface passed to the railroad, free from the contingency of future discovery of minerals on the lands covered by the patent. Shaw v. Kellogg, 170 U.S. 312, 339 (1898). Therefore, the railroad, as titleowner of the land, was able to reserve the minerals when it reconveyed the land to the United States. Since the United States had no interest in the mineral estate of the lands, no location under the mining laws was possible. Appellant's placer mining claims were located on lands to which the railroad held the mineral rights and are a nullity. See James W. Hansen, et al., 1 IBLA 134 (1970).

As to appellant's contention, that the lands withdrawn for the Colorado River Storage Project were at all times open to discovery and location under the mining laws, the law is otherwise. As stated in David W. Harper, et al., 74 I.D. 141, 145 (1967):

> A mining claim located on land which is not open to such location confers no rights on the locator and is properly declared null and void ab initio, and where the records of this Department show that land was not open to mining location at the time such a location was attempted, a hearing is not required to establish the invalidity of the claim. (Citing cases). Moreover, the subsequent revocation or modification of the order withdrawing land from mineral entry, and the restoration of the land to entry under the mining laws, will not validate a claim located while the land was closed to location, although the locator may be at liberty to locate a new claim. (Citing cases).

Appellant's placer mining claims located on withdrawn lands are null and void ab initio. This finding is not intended to determine the validity of claims located after the lands were opened to mineral location or held, after the lands were opened, for the period prescribed in 30 U.S.C. § 38 (1970). Meritt N. Barton, 79 I.D. ___, 6 IBLA 293 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joseph W. Goss, Member

We concur:

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Newton Frishberg, Chairman

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Frederick Fishman, Member